STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2015
v RONALD REGINALD HUGHES, Defendant-Appellant.	No. 322878 Wayne Circuit Court LC No. 13-010350-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DEANGELO LOUIS FINKLEY, Defendant-Appellant.	No. 323686 Wayne Circuit Court LC No. 13-006643-FH

Before: SHAPIRO, P.J., and O'CONNELL and GLEICHER, JJ.

PER CURIAM.

In Docket No. 322878, defendant Ronald Reginald Hughes appeals as of right his convictions, following a jury trial, of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. In Docket No. 323686, defendant Deangelo Louis Finkley appeals as of right his conviction, following a jury trial, of felony-firearm. We affirm.

I. FACTUAL BACKGROUND

According to Clifton Lockhart, he drove to the home of Finkley's grandmother to pick up his wife's child. Clifton's wife Natasha had a child in common with Hughes. Clifton stayed in the car with his son while Natasha went into the home to get Clifton's stepson. After Natasha went into the house, Finkley came out of it. Finkley walked up to Clifton's car window, put a gun to Clifton's head, and stated that he was upset that Clifton had spanked Hughes's son. Hughes then walked up to Clifton's car, told Clifton not to touch his son, and also put a gun to

Clifton's head. It was after 9 pm, but Clifton could see the gun because his car's headlights were on. It appeared to be a silver revolver. Clifton also testified that a black handgun that was found in Hughes's possession several months later was very similar to the gun that Hughes used to assault him. He testified that the black gun had looked silver when it moved in the light.

According to Clifton, Hughes hit him in the mouth with a gun and then Finkley hit him in the face with a gun. Hughes tried to open Clifton's car door and pull him out of the vehicle, but Finkley's sister Diamond stopped Hughes from doing so. Natasha testified that she came out of the door of the house and saw Finkley and Hughes holding guns on Clifton's car. Natasha saw first Hughes and then Finkley hit Clifton. However, Detroit Police Officer Brandolyn Johnson testified that when she took Natasha's statement, Natasha said that she only heard the commotion and came outside afterward.

According to Diamond, she saw Hughes argue with Clifton. Hughes punched Clifton in the face one time. She and Finkley ran to the car and grabbed Hughes, who walked away. Diamond did not see anything in Hughes's hand during the fight. The testimony of Rashell Finkley, Finkley's wife, was consistent with Diamond's testimony. Rashell also testified that Finkley was not carrying a gun because his grandmother does not allow guns in the house.

Detroit Police Sergeant Dana Leath testified that she investigated the assault. According to Sergeant Leath, Clifton stated that Hughes and Finkley assaulted him but he did not mention a gun. Sergeant Leath did not ask how Clifton was assaulted because the police report stated that he was struck with a pistol.

II. ADMISSION OF HUGHES'S HANDGUN

This Court reviews for an abuse of discretion preserved challenges to the trial court's evidentiary rulings. *People v Duncan*, 494 Mich 713, 722; 835 NW2d 399 (2013). The trial court abuses its discretion when its result falls outside the range of principled outcomes. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). We review de novo the preliminary questions of law surrounding the admission of evidence, such as whether a rule of evidence bars admitting it. *Duncan*, 494 Mich at 722. The erroneous admission of evidence can deprive a defendant of due process if it infused the trial with unfairness. See *Estelle v McGuire*, 502 US 62, 75; 112 S Ct 475; 116 L Ed 2d 385 (1991).

First, Hughes contends that the trial court should not have admitted evidence of his "bad act" of owning a handgun. Generally, MRE 404(b)(1) prohibits a party from introducing evidence of another party's other crimes, wrongs, or acts to prove that person's character or propensity to engage in a type of action. However, simply owning or possessing a handgun is not a "bad act" that falls within the scope of MRE 404(b). *People v Hall*, 433 Mich 573, 583; 447 NW2d 580 (1989). Therefore, we reject Hughes's assertion under MRE 404(b).

Second, Hughes contends that the trial court should have excluded the gun from evidence because its probative value was substantially outweighed by its prejudicial effect. We disagree.

"Evidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense." *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989).

But even if evidence is relevant, the trial court may not admit it if the danger of its prejudicial effect substantially outweighs its probative value. MRE 403. The prejudicial effect of the evidence substantially outweighs its probative value when evidence is only marginally probative and there is a danger that the trier of fact may give it undue or preemptive weight. *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

In this case, Clifton testified that Hughes used a handgun to assault him. Clifton initially told officers that the gun was silver, but he explained that the black gun had looked silver in the light. Clifton's identification was at least somewhat impeached, but it is for the jury, not this Court, to determine whether a witness's testimony should be believed. See *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). That Hughes owned a gun that Clifton testified was used to assault him made it more probable that Hughes did assault Clifton with the gun. This evidence was not marginally probative.

The evidence was also not unduly prejudicial. There is no reason why the jury would have given Hughes's ownership of a handgun undue or preemptive weight. We note that a variety of people own handguns, and there is no strong inference that every gun owner is a criminal. Additionally, the trial court gave a limiting instruction about the proper use of the gun as evidence in this case. We presume that a jury follows its instructions. *People v Armstrong*, 490 Mich 281, 294; 806 NW2d 676 (2011). We conclude that the trial court's decision to admit the handgun did not fall outside the range of principled outcomes.

III. GREAT WEIGHT OF THE EVIDENCE

Finkley contends that his verdict must be overturned because it is against the great weight of the evidence. We disagree.

The prosecution has the constitutionally based burden to prove each element of an offense beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). Generally, courts review a defendant's claim that the jury's verdict was against the great weight of the evidence to determine "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Galloway*, 307 Mich App 151, 167; 858 NW2d 520 (2014) (quotation marks and citation omitted). This may exist where a witness's testimony has been seriously impeached in a case with serious uncertainties and discrepancies. *Id*. But conflicting testimony alone is generally not grounds for a new trial. *Id*.

Finkley primarily bases his argument on the discrepancies in Clifton's testimony and the contradictions and discrepancies in Natasha's testimony. While Clifton's testimony was somewhat impeached, it was not markedly implausible. Similarly, that Natasha gave a different account than Clifton, and her account changed over time, does not render Clifton's testimony entirely without probative value. We conclude that the conflicting testimony in this case was not grounds for a new trial.

Finkley also contends that his conviction may not stand because the jury rendered inconsistent verdicts. A jury may render inconsistent verdicts. *People v Vaughn*, 409 Mich 463, 464; 295 NW2d 354 (1980). Additionally, a defendant may be convicted of felony-firearm even

if the jury did not find the defendant guilty of an underlying felony. *People v Lewis*, 415 Mich 443, 454-55; 330 NW2d 16 (1982).

In this case, the jury found Finkley guilty of felony-firearm while acquitting him of underlying felony charges. The jury need not render consistent verdicts or find the defendant guilty of a felony to find him or her guilty of felony-firearm. We conclude that Finkley is not entitled to a new trial.

IV. SERGEANT LEATH'S TESTIMONY

Finkley contends that the trial court erred by allowing Sergeant Leath to bolster Clifton's testimony. We disagree.

To preserve an evidentiary issue, the party opposing the admission of evidence must object at trial on the same ground that it asserts on appeal. *People v Douglas*, 496 Mich 557, 574; 852 NW2d 587 (2014). This issue is not preserved because defense counsel did not object when Sergeant Leath testified that Clifton's statements to her were consistent with his statements to a previous officer. Therefore, we will review this issue for plain error affecting Finkley's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error is plain if it is clear or obvious. *Id*. An error affected a defendant's substantial rights if it prejudiced that defendant. *Id*.

A witness may not opine about the credibility of another witness. *People v Musser*, 494 Mich 337, 349; 835 NW2d 319 (2013). Such statements have no probative value because it is the province of the jury to judge the credibility of the witnesses. *Id*. However, a party may admit a prior consistent statement through a third party under MRE 801(d)(1)(B). *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000).

In this case, Sergeant Leath testified that she had reviewed Officer Johnson's and Clifton's statements to her. She opined that both statements were consistent with each other:

> *Q*. . . . you had an opportunity this morning to review the dot one report . . . prepared by Miss Johnson, right?
>
> *A*. Yes, sir.
>
> *Q*. And you had a chance to review the statement you have right there in your lap, is that right?
>
> *A*. Yes, sir.
>
> *Q*. Is [sic] there inconsistencies between them?
>
> *A*. They're both consistent. I mean, they're consistent with each other.

Sergeant Leath then went on to explain that Clifton stated that he was attacked, who attacked him, and who was present in each statement. However, she testified that a difference was that Clifton did not specify the manner in which he was attacked to Sergeant Leath.

We conclude that this testimony was not clearly improper. Sergeant Leath, a lay witness, was no more qualified to determine whether Clifton's statements were consistent with each other than the jury was. However, Sergeant Leath did not directly opine about Clifton's credibility. Sergeant Leath instead testified that Clifton's account of the assault shortly after the assault was consistent with his later statements, in light of the defense counsel's contention that Clifton had fabricated the presence of a gun in the assault.[1] This is far from a clear or obvious case of a lay witness offering testimony about the credibility of another witness.

Additionally, we conclude that this statement did not affect Finkley's substantial rights. Finkley does not contend on appeal that Sergeant Leath's testimony led the jury to consider any evidence that would have been otherwise inadmissible. The jury itself could have compared Clifton's statements to determine whether they were consistent. Given the other evidence, it is highly unlikely that the jury's verdict rested on the brief statement by Sergeant Leath that Clifton had given consistent statements. Additionally, the trial court properly instructed the jury that it alone was to find the facts and decide which witnesses to believe. Had counsel challenged this statement, the trial court could have ruled on the issue and given a more specific curative instruction that would have mitigated the statement's potential prejudice. We conclude that Finkley has failed to demonstrate that a plain error affected his substantial rights.

V. INEFFECTIVE ASSISTANCE

Finkley also contends that counsel was ineffective for failing to challenge Sergeant Leath's statement. We disagree.

To preserve a claim of ineffective assistance of counsel, the defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). Because Finkley did not do so, this claim is not preserved. When reviewing an unpreserved issue of the effectiveness of counsel, our review is limited to mistakes apparent from the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). When considering an unpreserved claim of ineffective assistance of counsel, we must consider the possible reasons for counsel's actions. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012).

To prove that his defense counsel was not effective, the defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must overcome the strong presumption that defense counsel's performance constituted sound trial strategy. *Vaughn*, 491 Mich at 670. We give defense counsel wide discretion in matters of trial strategy because counsel may be required to take calculated risks to win a case. *Pickens*, 446 Mich at 325. A

[1] Whether that statement was properly admitted as a prior consistent statement is a different issue and one that Finkley does not raise on appeal.

defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different. *Vaughn*, 491 Mich at 670.

Even if admission of the testimony was error, counsel's failure to object does not necessarily render counsel ineffective. "[T]here are times when it is better not to object and draw attention to an improper comment." *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212 (2008).

In this case, even presuming that Sergeant Leath's statement was improperly admitted, reasonable counsel may have decided not to draw attention to Sergeant Leath's statement by voicing an objection. Instead, counsel may have decided to focus the jury's attention on different areas of impeachment. Additionally, we note that for the reasons previously stated, Finkley has not demonstrated that counsel's failure to challenge this remark prejudiced him. We conclude that Finkley has not demonstrated that defense counsel rendered ineffective assistance.

We affirm.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Elizabeth L. Gleicher